EMERGING ISSUES IN ELECTRONIC DISCOVERY:
Legal and Ethical Obligations Involving Electronic Evidence

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EMERGING ISSUES IN ELECTRONIC DISCOVERY

I. INTRODUCTION

Today, businesses rarely create and store paper documents. Well over ninety percent of all information is created in digital form on computers. This shift has created unforeseen difficulties for the broad discovery upon which our civil litigation system depends. As a result of the increasing use of electronic media, “the universe of discoverable material has expanded exponentially,” and discovery costs have skyrocketed. Discovery is no longer “just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”

The duty to preserve and produce documents relevant to litigation is not new. However, the use of electronic media has greatly broadened the scope of that duty. Because the amount of information has increased exponentially, the difficulty in identifying, preserving, and producing information that is relevant to a lawsuit is greater than it has ever been.

Electronic discovery also presents attorneys with serious ethical dilemmas. Attorneys have an ethical duty to aid and counsel clients in truthfully and fully responding to discovery requests. Therefore, if an attorney breaches his legal duties in this regard, he also commits an ethical breach. In addition, every attorney has an ethical duty to protect his client’s privileged information. The sheer volume of electronic information greatly increases the risk of inadvertent disclosure of privileged information and the waiver of that privilege. Despite the increased burden in reviewing documents, attorneys still have an ethical obligation to take every reasonable step to ensure that all privileged documents are identified and withheld.

This paper deals with the peculiar legal and ethical implications of the shift to electronic discovery. It discusses the most common and serious problems stemming from electronic discovery that courts, attorneys and litigants must face. To the extent possible, it focuses on employment discrimination cases. Because the courts have not uniformly dealt with electronic discovery issues, this paper is not intended to be, nor could it be, a comprehensive treatment of these issues.

II. THE RIGHT TO ELECTRONIC DISCOVERY

Courts have consistently held that information stored in electronic format is discoverable under the Federal Rules of Civil Procedure (“Federal Rules”) as long as it is within the scope defined by the Rules. Rule 26 permits parties to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.” The 1970 Advisory Committee Notes regarding Rule 34(a) specifically recognizes that discovery procedures under the Federal Rules apply to electronic data and information. Similarly, the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(a)(1)(B) indicate that parties should disclose the “nature and location” of “computerized data and other electronically recorded information.” Rule 26(b)(2) sets out the general limitations on the scope of discovery. Discovery “shall be limited by the court” if:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from other source that is more convenient, less burdensome, or less expensive;
(ii) the parties seeking discovery have had ample opportunity by discovery in the action to obtain the information sought; or
(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the

3 Zubulake I, 217 F.R.D. at 311.
4 Id. ExxonMobil’s in-house counsel recently estimated that his company spends $1.9 million a month creating and preserving electronic information on backup tapes for litigation. See Judicial Panelists Debate Need for Rules Covering Discovery of Electronic Data, 22 Empl. Discrim. Rep. (BNA) 9, at 252 (March 3, 2004).
5 Electronic discovery, particularly of e-mail, is critical in modern employment litigation. See Samuel Thumma & Darrel Jackson, The History of Electronic Mail in Litigation, 16 Computer & High Tech. L.J. 1 (Nov. 1999).
7 Fed. R. Civ. P. 34(a) Advisory Committee’s Notes, 1970, in relevant part provided: “The inclusive description of “documents” is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through a respondent’s devices, respondent may be required to use his devices to translate the data into usable form.”
8 Fed.R.Civ.P. 26(a)(1)(B) Advisory Committee’s Notes 1993. This requirement “by its plain language only goes to data already in electronic form at the time the mandatory disclosure is to be made.” In re Bristol Meyers Squibb Securities Litigation, 205 F.R.D. 437, 441 (D.N.J. 2002).
amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.

Discovery requests targeting non-privileged, relevant electronic information, and which do not run afool of Rule 26(b)(2), are appropriate under the Federal Rules. Electronic information or data stored in an electronic form is not immune from such requests. For example, courts have routinely held that electronic information is discoverable, in forms such as computer magnetic tapes, disks, computer files, e-mails, backup systems, hard drives, etc. Moreover, due to the unique nature of computerized data even “deleted” electronic information is subject to discovery because it is often saved on a backup or emergency system. Further, discovery of electronic information may be available even though a responding party has previously produced responsive documents in another form, such as paper. Courts, in some cases, have also ordered a responding party to “manufacture” electronic documents if the party did not have the data in electronic form. However, such an order is often conditioned on the requesting party’s willingness to pay for the creation of such documents.

However, if a request does not comply with the requirements of Rule 26, courts have not hesitated to deny a requesting party’s motion to compel. For example, in Stor chimney v. IPCO Safety Products Company of Pennsylvania, Inc., 1997 WL 401589 (E.D. Pa. July 16, 1997), the District Court for the Eastern District of Pennsylvania, in an FMLA retaliation suit, denied the plaintiff’s motion to compel computerized data regarding sales figures of other employees because the plaintiff could not show how it would be relevant to her claim.

9 See, e.g., Zabulake I, 217 F.R.D. at 317 (plaintiff “is entitled to discovery of the requested e-mails so long as they are relevant to her claims”); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) (“it is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable”); Rowe Entertainment, Inc. v. The William Morris Agency, Inc., 205 F.R.D. 421, 427, 431 (S.D.N.Y. 2002) (“electronic documents are no less subject to disclosure than paper records.”); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001) (“During discovery, the producing party has an obligation to search available electronic systems for information demanded.”).


11 See Simon Property Group, L.P. v. MySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (“computer records, including records that have been deleted, are documents discoverable under Fed. R. Civ. P. 34.”); Playboy Enterprises, 60 F.Supp.2d at 1053 (“Plaintiff needs to access the hard drive of Defendant’s computer only because Defendant’s action in deleting those e-mails made it currently impossible to produce the information as a ‘document’.”)

12 See, e.g., National Union Electronic Corp. v. Matsushita Electric Industrial Co., 494 F.Supp. 1257, 1262 (E.D. Pa. 1980) (the requesting party was entitled to a computer readable tape even though the responding party had already provided the same information in paper form); Haroco, Inc. v. American National Bank and Trust, Co. of Chicago, 662 F.Supp. 590, 596 (N.D. Ill. 1987), vacated in part, 1987 WL 17486 (N.D. Ill. Sept. 23, 1987) (the requesting party was entitled to discovery of information in electronic form even though the responding party had provided the same information in paper form).

13 See Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995) (“the producing party can be required to design a computer program to extract data from its computerized business records, subject to the court’s allocation of costs”); Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996) (requesting party had to pay for the costs responding party incurred in the “creation” of the electronic data); In re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 130 F.R.D. 634, 635 (E.D. Mich. 1989) (responding party required to create disk but the requesting party was to “pay all reasonable and necessary costs that may be associated with the manufacturing of the computer readable tape.”); Williams v. E. I. DuPont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987) (ordering requesting party to split the costs of manufacturing computerized information).

14 See, e.g., McCurdy Group, LLC v. American Biomedical Group, Inc., 9 Fed. App. 822, U.S. App. Lexis 10570, at *23 (10th Cir. May 21, 2001) (upholding district court’s refusal to permit a physical inspection of the plaintiff’s hard drive); In Re General Instrument Corporation Securities Litigation, 1999 WL 1072507, at *6 (N.D. Ill. Nov. 18, 1999) (burden or expense of the additional discovery of e-mails outweighed its likely benefit when among other things the responding party had already turned over thousands of pages of e-mails); Westrenien v. Americontinental Collection Corp., 189 F.R.D. 440, 441 (D. Or. 1999) (plaintiffs were not entitled to “unbridled access [to] defendants’ computer system,” instead, “plaintiffs should pursue other less burdensome alternatives”); Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C. 1998) (production of backup in archived e-mails, and deleted or archived computer files was denied because the production could not lead to the discovery of any information responsive to the request for production). Haroco, Inc., 662 F.Supp. at 596 (production not required because computerized tapes were of marginal usefulness).

15 1997 WL 401589, at *2.
In addition to the Federal Rules providing for electronic discovery, some states and federal districts have adopted special rules regarding electronic discovery. For example, to obtain information in electronic or magnetic form under Rule 196.4 of the Texas Rules of Civil Procedure, the requesting party must specifically request production of electronic or magnetic data and specify the form in which it is requested. Likewise, State of Virginia Supreme Court Rule 3A:12 provides that responsive information stored in electronic form need only be produced in electronic form if a hard copy is unavailable. Under Local Rule 26.1 of the Eastern and Western Districts of Arkansas, the Rule 26(f) report must disclose a parties’ intent to request information contained in electronic or computer based form. Similarly, under Local Rule 26.1 of the District of Wyoming, the requesting party must disclose their intent to discover computer based or electronic information and identify the categories of information sought.

III. THE DUTY TO PRESERVE

Because electronic evidence is just as discoverable as any other, litigants and their attorneys clearly have a duty to preserve any and all electronic documents that may be relevant to pending or reasonably anticipated litigation. Relevance is broadly defined in the electronic discovery context. Although the general duty to preserve relevant documents is clear, courts do not agree on when the duty arises. In making this determination, courts generally focus on whether the party had notice that the information in question was relevant to pending or reasonably anticipated litigation. It is this particular determination—when a party is put on notice that certain documents are relevant to pending or anticipated litigation—upon which the courts disagree.

Despite the uncertainty, it is critical for litigants and their counsel to identify when the duty arises because once it does, they generally have a duty to preserve all unique, relevant evidence. Counsel, in particular, must be careful to identify when the duty arises because “[o]nce on notice, the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.”

A party is clearly put on notice of litigation and has a duty to preserve relevant documents when a complaint is filed and that party is served. While a full treatment of when courts have held the duty to preserve arises is beyond the scope of this paper, suffice it to say that the preservation duty may be held to arise much earlier than the filing or service of a complaint, depending on the jurisdiction. By way of example, courts have held that a party is put on notice from similar litigation in another jurisdiction, or even when an informal letter from opposing counsel warns of possible future litigation. In the employment context, one court has recently ruled that a defendant-employer’s duty to preserve evidence relevant to an employment discrimination claim arises, “at the latest,” when the plaintiff files an EEOC charge. Thus, counsel and their clients should take care to begin preserving relevant documents as soon as they reasonably anticipate litigation, even if that reasonable anticipation occurs prior to the plaintiff filing suit. Otherwise, they place themselves at risk of breaching the preservation duty and spoliating

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16 Tex. R. Civ. P. 196.4.
20 See, e.g., Zubulake v. U.B.S. Warburg, L.L.C. (Zubulake IV),--F.R.D.--, 2003 WL 22410619, at *3 (S.D.N.Y. Oct. 22, 2003) (quoting William T. Thompson Co. v. General Nutrition Corp., Inc., 593 F.Supp. 1443, 1455 (C.D. Cal. 1984) (internal quotation omitted)) (“[A]nyone who anticipates being a party or is a party to a lawsuit may not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession...it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request).
IV. ETHICAL CONCERNS IN ELECTRONIC DISCOVERY

A. Ethical Duty to Preserve and Produce Documents

In addition to their legal duty, attorneys also have an ethical obligation to ensure proper document preservation and production. ABA Model Rule of Professional Conduct 3.4(a) states that “[a] lawyer shall not: unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”27 The Comment to Rule 3.4(a) elaborates that “[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence,...obstructive tactics in discovery procedure, and the like.”28

Many states have adopted similar rules. For example, Texas Disciplinary Rule of Professional Conduct 3.04(a)29 is nearly identical, except that the language specifically applies to evidence in anticipation of a dispute that a competent attorney would believe has potential or actual evidentiary value.30 Clearly, attorneys have an ethical obligation to guard against the destruction of relevant evidence, including the obligation not to counsel or assist their clients in doing so.31

B. The Importance of Protecting Against Inadvertent Disclosure

ABA Model Rule of Professional Conduct 1.6(a) provides that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation.”32 This includes information protected by the attorney-client privilege.33 Therefore, every attorney has an ethical obligation to safeguard their client’s information that falls under the attorney-client privilege. Yet, the explosion in electronic document creation and communication has rendered this task more difficult than ever. Attorneys now must often conduct a privilege review of thousands of electronic documents in complex cases. Mistakes are bound to happen, and some privileged documents will inevitably be disclosed to the opposing party. Despite the difficulty in ensuring against inadvertent disclosure in such circumstances, attorneys have an ethical duty to their clients to do so.

Courts take differing approaches to determining whether or not the inadvertent disclosure of privileged documents waives attorney-client privilege. Generally, the approaches fall into one of three categories. First, some courts hold that inadvertent disclosure never waives attorney-client privilege.34 Second, other courts have adopted a “strict accountability” rule and hold that the privilege is always waived by the inadvertent disclosure of privileged documents.35 Third, many courts have adopted a middle road/balancing approach to determine when inadvertent disclosure waives attorney-client privilege.36 Except in those jurisdictions that have adopted the “never waived” approach, the legal consequences for the client can be severe for counsel’s breach of the ethical duty to ensure preservation of the attorney-client privilege.

For example, in Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000), the District Court for the District of Massachusetts held that the attorney-client privilege had been waived by the inadvertent disclosure of 200 privileged documents out of a total of 200,000 reviewed, of which 70,000 were produced to the opposing party in a complex patent suit.37 After reviewing the three general approaches described above, the court adopted the middle road/balancing approach because it provides flexibility and “accounts for the errors that inevitably occur in modern document-intensive litigation.”38 The court then identified and applied five factors that courts using this approach consider, “including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount

30 Id. Texas adopted Model Rule 3.4(a)’s Comment 1 verbatim.
31 Some federal courts have codified this ethical duty in their local rules. See, e.g., Danis, 2000 WL 1694325, at *1 (threshold duty to preserve “finds expression in this Court’s Rules of Professional Conduct,” which is a verbatim adoption of the ABA’s rule).
32 MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (1983).
33 MODEL RULES OF PROF’L CONDUCT R. 1.6(a) cmt. 16 (1983).
35 See Amgen Inc., 190 F.R.D. at 290.
36 See id. at 291.
37 190 F.R.D. at 292-93.
38 Id. at 292.
of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.”

C. Measures to Deal With the Realities of Electronic Discovery and the Risk of Inadvertent Privilege Waiver

In response to the increased risk of inadvertent disclosure in electronic discovery, some states have revised their discovery rules to protect litigants against waiver of the attorney-client privilege. For instance, Texas recently revised its procedural rules to protect against privilege waiver in the event of inadvertent disclosure. Under Rule 193.3(d), if privileged documents are inadvertently produced without the intent to waive a claim of privilege, the privilege is not waived if the producing party requests return of the documents within ten days (or shorter time on court order) of the discovery of the inadvertent production. If the producing party amends its response to the production request and asserts a privilege over the inadvertently produced documents and the court determines that the privilege exists, then there is an ethical requirement that the party receiving the information take affirmative steps to return all versions of the document, including any electronically reproduced copies or images.

A U.S. Judicial Conference Committee approved a package of rule amendments on April 16, 2004, to deal with the realities of electronic discovery. One of the amendments approved would change Federal Rule of Civil Procedure 26 to allow the disclosing party to retrieve inadvertently disclosed privileged documents and would protect against privilege waiver. In fact, the receiving party would be required to return the information if the producing party requests it. If the receiving party does not return the documents, it will have the burden of proving to the court why it is entitled to them. However, the proposed rule amendments will not take effect until and unless they are approved by the Judicial Conference’s standing rules committee, the full conference, the United States Supreme Court, and Congress. The earliest the proposed changes could become effective is December 2006.

For now, some attorneys attempt to protect against waiver by seeking an agreement with opposing counsel that neither party waives any privilege when they inadvertently disclose privileged documents. In addition, counsel may seek a court order to the same effect. In the end, thorough and competent document review remains the best protection against ethical breaches and privilege waiver by inadvertent disclosure.

V. PENALTIES FOR FAILING TO REPLY WITH DISCOVERY REQUESTS

A. Spoliation of Evidence

“Spoliation is the willful destruction of evidence or the failure to preserve potential evidence for another’s use in pending or future litigation.” Spoliation has become an increasingly important issue as the breadth of electronic discovery has grown. There are more documents than ever that can be accidentally deleted or intentionally destroyed. Thus, courts are frequently called on to decide electronic discovery disputes containing allegations of spoliation. When courts find that a party has failed to preserve relevant documents or has intentionally destroyed them, the penalties, in the form of sanctions, can be severe. Courts take very seriously spoliation claims because:

The destruction of evidence can lead to manifest unfairness and injustice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action and can increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence that may be less persuasive, less accessible, or both.

43 Trigon Insurance Co., 204 F.R.D. at 285; see also Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001) (courts must sanction spoliation “to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth”); Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) (noting that lawsuits are a search for the truth, and full and honest discovery is the key to that
1. Authority to Sanction Spoliation

Courts may sanction a party for spoliation of evidence under either Rule 37(b) or its inherent authority. Courts may only use their authority under Rule 37(b) to sanction spoliation when a party has destroyed or withheld evidence in contravention of a court order. Thus, because destruction of evidence most often occurs prior to the entering of any explicit discovery orders, courts frequently rely on their inherent authority to sanction spoliation. In general, the analysis is the same under either source, so the distinction is largely one without a difference.

a. Determining Whether to Sanction

The courts do not completely agree on the essential elements of a spoliation claim. However, all courts seem to require at least a showing that: (1) the alleged spoliator had a duty to preserve the documents; (2) the alleged spoliator destroyed the documents with some level of culpability or blameworthiness; (3) the spoliated evidence was relevant to some party’s claims or defenses; and (4) the moving party has suffered some prejudice because of the spoliation.

2. The Purposes of Sanctions

Courts generally recognize that sanctions are intended to serve one or more of three purposes, including: (1) compensation—to place the innocent party in the same evidentiary position that they would have been in had the evidence not been destroyed; (2) punishment—to penalize the spoliator for its discovery abuse; and (3) deterrence—to send a message to other current and future litigants that spoliation will not be tolerated, but rather will be punished.

a. How Courts Determine What Sanctions are Appropriate

Courts have broad discretion to determine what sanctions are appropriate, under either Rule 37(b) or their inherent authority. This discretion is necessary because the inquiry into what sanction is appropriate is fact-specific and is determined on a case-by-case search); Danis v. USN Communications, Inc., 2000 WL 1694325, at *1-2 (N.D. Ill. Oct. 23, 2000) (noting that to uphold people’s faith in the judicial process, discovery must be fair and conducted with integrity, so “when a charge is made that relevant information has been destroyed, and especially when a charge is made of intentional destruction, it is a charge that strikes at the core of our civil litigation system”).


45 See, e.g., Shepherd, 62 F.3d at 1474-75 (turning to inherent authority to analyze district court’s award of sanctions because the court had not issued any explicit discovery order).

46 See Wiginton, 2003 WL 22439865, at *3 n. 5 (proceeding under the court’s inherent authority because no discovery order had been ignored, “noting that the analysis is essentially the same under either alternative.”). But see Shepherd, 62 F.3d at 1480 (overturning district court’s award of default judgment for spoliation, and distinguishing between a court’s Rule 37(b) to award default judgment or dismiss claims and its inherent authority, because a court’s inherent power “is not grounded in rule or statute and must be exercised with particular restraint.”).

47 See Wiginton, 2003 WL 22439865, at **4-6 (elements of spoliation are: (a) duty to preserve; (b) intentional or willful destruction; and (c) relevance); Zubulake IV, 2003 WL 22410619, at *6 (elements required for an adverse inference instruction are: (a) duty to preserve; (b) destroyed with a "culpable state of mind;" and (c) relevance); Trigon Insurance Co., 204 F.R.D. at 286 (elements are: (a) duty to preserve; (b) intentional destruction; and (c) prejudice; but some prejudice is presumed as natural consequence of destruction); Danis, 2000 WL 1694325, at *31 (elements are: (a) duty to preserve; (b) breach of that duty with some level of culpability; and (c) prejudice); McGuire, 175 F.R.D. at 154 (elements are: (a) duty to preserve; (b) breach of that duty; (c) intentional destruction; (d) relevance; and (e) prejudice; but prejudice bears more on the issue of what sanction is appropriate); Computer Associates International, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 168-69 (D. Colo. 1990) (elements are: (a) duty to preserve; (b) breach of that duty with some culpability; and (c) relevance).

48 Metropolitan Opera Association, Inc., 212 F.R.D. at 219 (holding that sanctions serve two functions—punishment and deterrence); Trigon Insurance Co., 204 F.R.D. at 287 (“Once spoliation has been established, the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation.”); Danis, 2000 WL 1694325, at *31 (holding that sanctions one or more of three purposes—compensation, punishment, and/or deterrence); Koch Industries, Inc., 197 F.R.D. at 483 (among the purposes sanctions serve are punishment, general deterrence, and compensation).

49 See, e.g., Stevenson v. Union Pacific Railroad Co., 354 F.3d 739, 747-48 (8th Cir. 2004) (reviewing district court’s grant of adverse inference instruction only for abuse of discretion and upholding the sanction award despite questioning its wisdom); Vodusek, 71 F.3d at 156 (noting that general rule is that district court has broad discretion in fashioning appropriate remedy for spoliation). But see Shepherd, 62 F.3d at 1475 (“Although we review a district court’s use of its inherent power only for abuse of discretion, our review is not perfunctory.”) (internal citation omitted).
basis. Accordingly, there is no single test or set of factors for determining the appropriate sanction(s) in a particular case. But courts generally consider: (1) the degree of fault/culpability of the spoliating party; (2) the degree of prejudice suffered by the innocent party; and (3) whether a lesser sanction will serve the purposes outlined above. The most important considerations are the degree of fault and the degree of prejudice suffered. If the degree of fault and/or the degree of prejudice suffered is great, the sanction may be severe, including default judgment or dismissal of claims.

B. Types of Sanctions

A court may sanction spoliation of evidence using a variety of remedies, "including imposing fines, shifting costs and awarding attorneys fees, excluding evidence, instructing the jury on permissible adverse inferences to be drawn from the missing evidence, or even dismissing claims or entering default judgment." How courts handle claims for adverse inference instructions, fines/attorneys fees, and default judgment/dismissal is discussed below.

1. Adverse Inference Instructions

The rationale for giving an adverse inference instruction for the spoliation of evidence is "captured in the maxim omnia presumuntur contra spoliatorem, which means, 'all things are presumed against a despoliator or wrongdoer.'" An adverse inference instruction is an instruction allowing, but not requiring, the jury to infer that the destroyed or withheld evidence would have been harmful to the spoliator's case if it had been produced. The inference may be rebutted by evidence that satisfactorily explains why the spoliated evidence was not produced. It is a very serious sanction because it is often difficult to rebut; and when it is not rebutted, the adverse inference instruction may be outcome determinative.

Despite its importance, courts do not agree on the level of fault that must be found before an adverse inference instruction is given. Some courts hold that a party moving for sanctions need not show the evidence was destroyed in bad faith. For example, the Second Circuit only requires the aggrieved party to show mere negligence. And in the Fourth Circuit, the party seeking an adverse inference instruction must show more than mere negligence, but less than bad faith. Specifically, the innocent party must demonstrate that the spoliator knew the evidence was destroyed in bad faith. Other courts hold that a showing of bad faith is a prerequisite to securing an adverse inference jury instruction. In the spoliation context, bad faith is perhaps best

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51 Id. at 288 (quoting Gates Rubber Co. v. Bando Chemical Industries, Ltd., 167 F.R.D. 90, 102 (D. Colo. 1996); Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C].
52 Trigon Insurance Co., 204 F.R.D. at 288 (quoting Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3rd Cir. 1994)); Koch Industries, Inc., 197 F.R.D. at 483 ("A court should select the least onerous sanction necessary to serve [the] remedial purposes. The severity of the sanction selected should be a function of and correspond to the willfulness of the spoliator’s destructive act and the prejudice suffered by the non-spoliating party."); Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C].
53 Silvestri, 271 F.3d at 593 (to justify a sanction, at bottom, the district court must consider the spoliator’s conduct and the prejudice caused); Trigon Insurance Co., 204 F.R.D. at 288 ("Given the rationale for, and the policy behind, the rule against spoliation, assessment of sanctions depends most significantly on the blameworthiness of the offending party and the prejudice suffered by the opposing party."); (citations omitted); Koch Industries, Inc., 197 F.R.D. at 483 (the two factors carrying the most weight are the degree of culpability and the degree of prejudice suffered).
54 See, e.g., Silvestri, 271 F.3d at 593 ("At bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator’s conduct and the prejudice caused and be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.").
55 Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[A]; see also Shepherd, 62 F.3d at 1475 (citing Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 28(A) (2d ed. 1994)) (noting that available sanctions under a court’s inherent authority include default judgment, fines, expenses, attorneys fees, evidence preclusion, adverse inference instructions, contempt citations, and disqualification of counsel).
57 Vodusek, 71 F.3d at 155-56.
58 Id. at 156.
60 See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2nd Cir. 2002); Vodusek, 71 F.3d at 156; Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214 (1st Cir. 1982).
61 Residential Funding Corp., 306 F.3d at 108.
62 Vodusek, 71 F.3d at 156.
63 See, e.g., Stevenson, 354 F.3d at 746; Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997); Aramburu v. The Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997); S.C. Johnson & Son, Inc. v. L & N R. Co., 695 F.2d 253 (7th Cir. 1982); Vick v. Texas Employment Commission, 514 F.2d 734, 737 (5th Cir. 1975).
understood as intentional destruction of relevant evidence with the desire to suppress the truth or interfering with the other party’s ability to make its case. 64

Adverse inferences play a significant role in employment litigation, both at the summary judgment stage and at trial. This is particularly true in employment discrimination cases stemming from EEOC charges. EEOC regulations 29 C.F.R. §§1602.14 (private employers) and 1602.31 (public employers) require a defendant-employer who is notified of an EEOC charge of discrimination to “preserve relevant personnel records until the charges’ final disposition.” 65 In essence, “once an employer learns an employee (or ex-employee) has filed a charge of discrimination against it, the employer cannot destroy or discard any relevant personnel records.” 66 “Relevant personnel records” is broadly defined to include not only the plaintiff’s personnel records but also those pertaining to the plaintiff’s supervisor(s), “underlings, peers, or any other employee, depending on the facts of the case.” 67 As a result, when a defendant-employer destroys relevant personnel files before the end of litigation despite these administrative regulations, a plaintiff-employee may move for sanctions, including an adverse inference. In this context, several courts have granted a plaintiff-employee’s motion for an adverse inference, or have at least recognized the propriety of applying such an inference. 68 In some cases, the adverse inference may be sufficient to overcome a defendant-employer’s motion for summary judgment. 69 These cases clearly illustrate the profound effect an adverse inference sanction for spoliation can have on employment discrimination cases.

2. Fines/Attorneys Fees

    Awards of costs and attorneys fees are the most commonly granted sanctions for spoliation. 70 Fines are also relatively common. 71 Courts may grant these monetary sanctions under the Federal Rules, their inherent authority, or by statute. Monetary sanctions can be levied against the spoliating party, including its individual officers, the attorney(s), or both, depending on whom the court finds responsible for the spoliation. 72 In essence, anyone responsible for the preservation and production of relevant documents may face monetary sanctions for spoliation.

    Because fines and an award of attorneys fees are essentially punitive, some courts require a showing of discovery misconduct by clear and convincing evidence before granting these monetary sanctions. 73 Others require a showing of bad faith, at least when proceeding under the court’s inherent authority to sanction spoliation. 74 Still others will award attorneys

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64 See Stevenson, 354 F.3d at 746; Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C][a].
65 Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418-19 (10th Cir. 1987).
67 Id. at 628.
68 See Hicks, 833 F.2d at 1419 (granting plaintiff a rebuttable adverse inference/presumption that destroyed clock charts and daily reports, upon which defendant relied in disciplining plaintiff, would have bolstered her case had they been produced and reversing judgment for defendant);
Morgan v. Houston’s Restaurants, Inc., 84 F.E.P. Cases 696 (S.D. Fla. 2000) (granting plaintiff’s motion in limine in part by granting a rebuttable inference of pretext based on destroyed documents through summary judgment stage and prima facie case at trial; reserving judgment on whether adverse inference instruction would be given to the jury);
Lombard, 13 F.Supp.2d at 629 (granting plaintiff a rebuttable presumption, for summary judgment purposes, that destroyed files would have been favorable to her case if produced and denying defendant’s motion for summary judgment on retaliation claim; reserving for trial the determination of the extent and weight of the presumption);
69 See Morgan, 84 F.E.P. Cases 696; Lombard, 13 F.Supp.2d at 629; Shipley, 874 F.Supp. at 940.
70 Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C][2].
71 Id.
72 Metropolitan Opera Association, Inc., 212 F.R.D. at 220 (court may sanction party and/or attorneys under inherent power); Danis, 2000 WL 1694325, at *6 (fining CEO personally for spoliation caused by his lack of action to ensure preservation).
73 See Shepherd, 62 F.3d at 1477, 1478 (citing Autorama Corp. v. Stewart, 802 F.2d 1285, 1287-88 (10th Cir. 1986); Weinberger v. Kendrick, 698 F.2d 61, 80 (2nd Cir. 1982)) (under inherent authority, courts must find predicate misconduct by clear and convincing evidence before imposition of fines and attorneys fees); Danis, 2000 WL 1694325, at *34 n.22 (imposition of fines requires clear and convincing evidence under Rule 37 or inherent authority because of penal nature; reasoning would apply with equal force to attorneys fees).
74 See Stevenson, 354 F.3d at 751 (courts have the inherent authority to award attorneys fees so long as there is a finding of bad faith—i.e., the misconduct “abuses the judicial process in some manner.”); Metropolitan Opera Association, Inc., 212 F.R.D. at 220 (under inherent authority, bad faith must be shown before attorneys fees are awarded).
fees, costs or impose fines absent clear and convincing evidence or a finding of bad faith. Therefore, litigants and their attorneys should determine the standards for imposing monetary sanctions for spoliation in their specific jurisdiction.

3. Default Judgment/Dismissal

An award of default judgment/dismissal of claims is clearly the most severe sanction that can be given for spoliation. There is a general presumption in favor of disposition of cases on the merits. These sanctions, therefore, are generally viewed as a last resort. This does not mean, however, that a litigant or its counsel must first receive a warning that continued spoliation will result in sanctions, in general, or default/dismissal, in particular. But the fact that a party and its counsel have been given several chances and warnings but continue their spoliation may be considered in determining whether default/dismissal is appropriate.

Although the courts are not in total agreement on the standards used to determine whether default/dismissal is appropriate, most consider: (1) the egregiousness of the spoliator’s conduct; (2) the prejudice caused by the spoliation; and (3) whether lesser sanctions would sufficiently compensate for, punish and deter the spoliation. The egregiousness of the conduct and the prejudice suffered are balanced with each other to determine whether default/dismissal is appropriate. The most severe sanctions may be appropriate either when the conduct is very egregious, or when the resulting prejudice is severe.

The courts generally agree that proof of willfulness or bad faith is needed before default/dismissal will be granted. Courts disagree over the level of proof necessary, however, to grant default/dismissal. Some courts, particularly when proceeding under their inherent authority, require clear and convincing evidence of the spoliator’s conduct and level of culpability. Again, litigants and

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75 Zubulake IV, F.R.D., 2003 WL 22410619, at *7 (finding no bad faith and proceeding under preponderance of evidence rule, yet ordering spoliating party to pay costs of re-deposing four witnesses regarding the destruction of relevant electronic documents and issues raised by destruction); Trigon Insurance Co., 204 F.R.D. at 291 (awarding attorneys fees and costs of preparing for and litigating spoliation issues under preponderance of evidence standard and after explicitly acknowledging that bad faith is not necessary for sanctions in the Fourth Circuit).

76 Counsel should also note that they can be held personally liable for spoliation under 29 U.S.C. §1927. See Metropolitan Opera Association, Inc., 212 F.R.D. at 220 (counsel can be held personally liable for attorneys fees and costs when their actions multiply and delay proceedings “unreasonably and vexatiously” in bad faith).

77 Wiginton, 2003 WL 22439864, at *6 (default is reserved for extreme cases); Metropolitan Opera Association, Inc., 212 F.R.D. at 220 (default is reserved only for extreme circumstances); ABC Home Health Services, Inc. v. International Business Machines, Corp., 158 F.R.D. 180, 182 (S.D. Ga. 1994) (default or dismissal is used only as a last resort).

78 Metropolitan Opera Association, Inc., 212 F.R.D. at 230 (warning is not required before sanctions, including default, can be given for spoliation); Danis, 2000 WL 1694325, at *31 (same).

79 Metropolitan Opera Association, Inc., 212 F.R.D. at 184 n. 4 (Counsel and the litigant “had more than sufficient opportunity to correct their deficiencies during the course of discovery…The time to face the consequences is now at hand.”); Wm. T. Thompson Co., 593 F.Supp. at 1456 (pattern of violations, including ignoring four separate court orders, served as an independent basis for granting default judgment and dismissing claims in a related suit).


81 Silvestri, 271 F.3d at 593-94 (holding that court must consider the egregiousness of the spoliator’s conduct and/or the prejudice caused, and find one or the other so egregious as to warrant dismissal); Shepherd, 62 F.3d at 1478-79 (default is usually reserved only for cases of wholesale destruction or the destruction of dispositive evidence, and district court must specifically provide a reasoned basis why lesser sanctions are insufficient); Wm. T. Thompson Co., 593 F.Supp. at 1456 (granting default judgment because spoliator acted willfully, spoliation destroyed the best available evidence regarding central issues in the case, and lesser sanctions would effectively reward spoliator for egregious conduct).

82 Silvestri, 271 F.3d at 593-94 (court must consider conduct and prejudice—dismissal usually granted only where bad faith shown, but may also be used when prejudice is “extraordinary”; affirming dismissal because plaintiff destroyed only physical evidence in products liability case even though was perhaps merely negligent); Danis, 2000 WL 1694325, at *34 (when spoliation is negligent, look to prejudice to balance; declining to grant default judgment because spoliation was negligent and destroyed evidence was not the only evidence, even if it was the best); Wm. T. Thompson Co., 593 F.Supp. at 1456 (finding two independent bases for granting default for spoliation—spoliation deprived the aggrieved party of critical evidence, and spoliation was willful, i.e., there was a pattern of violations of court orders).

83 Silvestri, 271 F.3d at 593 (proof of bad faith is generally required for default/dismissal in the Fourth Circuit, but negligence may be sufficient if extreme prejudice); Wiginton, 2003 WL 22439864, at *6 (requiring willfulness, bad faith or objective unreasonableness); ABC Home Health Services, Inc., 158 F.R.D. at 182 (willfulness or bad faith required in Eleventh Circuit); Wm. T. Thompson Co., 593 F.Supp. at 1455 (willfulness/bad faith required, at least under the court’s inherent authority).

84 See, e.g., Shepherd, 62 F.3d at 1472 (requiring clear and convincing evidence of abusive discovery misconduct, as opposed to preponderance, before granting default under inherent authority); see also Danis, 2000 WL 1694325, at
counsel should check the most current case law in their jurisdiction to determine what standard the court will use to decide what sanction is appropriate.

VI. A POSSIBLE DEFENSE TO SANCTIONS: DOCUMENT RETENTION POLICIES

A. Introduction

A document retention policy consists of a set of guidelines for a company and its employees to follow when determining how to handle the records the company creates in its ordinary course of business. Such a policy not only specifies the period of time during which documents are to be retained, but also the manner in which documents that are no longer necessary are to be destroyed.  

As a result of the costs associated with storing a large volume of paper documents, many businesses already have document retention policies in place to govern how they retain and destroy these documents. In contrast, perhaps because storing electronic data is relatively inexpensive, many companies have simply ignored the need to formulate a document retention policy specifically aimed at how they handle the electronic documents they create. As companies increasingly use electronic means to create and store documents instead of paper, however, it is essential for them to have well-crafted, comprehensive electronic document retention policies in place before litigation ever commences or is even threatened.

Although the appropriate electronic document retention policy will depend on the individual company’s needs, there are certain guidelines that companies may follow to create and implement an effective policy. As a practical matter, the most important step in creating an effective policy may be having in-house and outside counsel work together closely in developing the plan. As part of this review, the company should profile its computer system. This includes conducting an inventory of its existing hardware, software, and available electronic media, as well as the existing stored information on floppy disks, hard drives, CD-ROMs, magnetic tapes, archival tapes, and backup tapes.

The company should then develop a plan that ensures: (a) documents that must be retained in accordance with applicable laws and regulations are preserved as long as necessary; (b) documents that are necessary for the conduct of business are filed in a systematic manner and are accessible when necessary; (c) documents that must be permanently maintained are cataloged and reduced to microfilm or microfiche for easy storage and access; (d) documents that are relevant to foreseeable or pending judicial, administrative or congressional investigations or proceedings are easily identified and preserved; and (e) all other documents are destroyed.

After implementing its policy, the company should train employees regarding the significance of particular data and the consequences of its destruction. To that end, the company may want to designate a particular person or department, such as the IT department, to ensure employees receive adequate training and comply with the policy. Finally, especially when litigation is reasonably foreseeable or pending, the company must plan ahead and develop a way to suspend the routine destruction of documents under its plan. This is commonly referred to as a litigation hold. Its purpose is to preserve all documents that are relevant to threatened or pending litigation, particularly when they would normally be destroyed under the company’s electronic document retention policy.

Having a formal electronic document retention program in place that meets the criteria described above will be beneficial for several reasons. Foremost among these is that an electronic document retention policy may reduce a company’s legal exposure. In particular, a formal, comprehensive electronic document retention policy can aid a company in avoiding spoliation of evidence claims and their attendant sanctions.

While there are few cases concerning electronic document retention policies in particular, there have been several important decisions that have dealt with document retention policies in general, in addition to the sanctions that a party may suffer for destroying relevant documents under its policy. These decisions illustrate several general principles that companies should keep in mind when they are formulating and implementing electronic document retention policies.

B. Non-Electronic Document Retention Policy Cases

In one of the earliest cases regarding the effect of destroying relevant documents under an established document retention policy, *Vick v. Texas Employment Commission*, 514 F.2d 734 (5th Cir. 1975), the Fifth Circuit Court of Appeals held that destruction of records regarding the plaintiff under a routine document retention policy “well in advance” of the plaintiff’s service of interrogatories did not give rise to...
to an adverse inference. The plaintiff sued the Texas Employment Commission under Title VII and the Civil Rights Act of 1871 for gender discrimination, alleging that the commission had unlawfully denied her unemployment benefits and failed to refer her for jobs because of her pregnancy. She claimed that the district court erred in not employing the adverse inference rule to find the agency in violation of Title VII because it destroyed the relevant documents. However, the appeals court held that the “adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant.”

Because the agency destroyed the records under its routine document retention policy prior to the service of interrogatories, the destruction did not support a finding of bad faith. Therefore, there were insufficient grounds to employ an adverse inference.

Conversely, in Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D.Fla. 1984), the District Court for the Southern District of Florida held that the defendant-company’s document retention policy provided no defense to a claim of spoliation of evidence and the sanction of default judgment. In this wrongful death and products liability action against an aircraft manufacturer, the court found that the company had intentionally destroyed relevant documents both before and after the commencement of the lawsuit. The defendant attempted to defend its destruction of documents by citing its document retention policy. The court, however, rejected the defense because the company had not consistently followed its policy and failed to implement a litigation hold on its policy after commencement of the suit.

In essence, the court found that the policy was a “sham,” so the company’s defense was unavailing. However, the court emphasized that it was “not holding that the good faith disposal of documents pursuant to a bona fide, consistent and reasonable document retention policy cannot be a valid justification for a failure to produce documents in discovery.” The defendant had simply failed to prove that that was the situation in the case at bar. Because the defendant had no defense for its destruction of relevant evidence, the court granted the plaintiff’s motion for default judgment on the issue of liability.

In Levy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988), another products liability case, the Eighth Circuit Court of Appeals left for remand the issue of whether the defendant-gun manufacturer’s destruction of certain relevant evidence, including complaints and gun examination reports, under its document retention policy should be sanctioned by giving a general adverse inference jury instruction at a new trial. The defendant argued that the trial court had erred in giving such an instruction at the first trial. To support its contention, the company argued “that destroying records pursuant to routine procedures does not provide an inference adverse to the party that destroyed the documents.” Although the court found the record inadequate to rule one way or the other, it did provide guidance to the trial court for determining the issue on remand.

The court delineated three factors for the trial court to consider if it was faced with the issue again on remand. First, the trial court should determine if the document retention policy “is reasonable considering the facts and circumstances surrounding the relevant documents.” To illustrate its point, the court noted that a three year retention policy may be long enough for certain documents, like appointment books and telephone messages, but not long enough for other documents, such as customer complaints. Second, the trial court should also consider whether lawsuits concerning the particular complaint or similar ones had been filed, as well as “the frequency of such complaints, and the magnitude of the complaints,” if any. Finally, the appellate court directed the district court to determine whether the policy was instituted in bad faith. The court expanded on this requirement, noting that in cases where such a policy is instituted for the purpose of destroying or withholding damaging evidence from potential plaintiffs, then it may be proper to give an adverse inference instruction to the jury. In addition, “even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy.” By way of example, the court observed that if the company knew or should have known that the documents would be relevant to litigation at some point, then the documents should have been preserved. In sum, a party “cannot blindly destroy documents and

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88 514 F.2d at 737.
89 Id.
90 102 F.R.D. at 486.
91 Id. at 485.
92 Id.
93 Id. at 486.
94 There is no reported case from the district court following remand.
95 836 F.2d at 1111. The company had implemented the policy in 1970. Under its policy, complaints and gun examination reports were kept for three years and then destroyed if no action was taken with respect to the particular record in that time.
96 Id. at 1112.
97 Id.
98 Id.
99 Id.
expect to be shielded by a seemingly innocuous document retention policy.\textsuperscript{100}

More recently, in Stevenson v. Union Pacific Railroad Co., 354 F.3d 739 (8th Cir. 2004), a wrongful death/negligence suit, the Eighth Circuit held that the defendant-railroad company had destroyed relevant evidence—voice tapes from the time of the plaintiff’s death from having his car struck by a train at a railroad crossing—under its document retention policy in bad faith and, therefore, the district court did not err in giving an adverse inference instruction. The court remarked:

We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.\textsuperscript{101}

The court reiterated and purportedly applied the three factors described above in making its determination. It did not, however, perform a step-by-step analysis of the factors. Instead, the court initially noted that the company only kept the tapes of the conversations between the train engineer and dispatch for ninety days before reusing them.\textsuperscript{102} It impliedly adopted the district court’s finding that such a short period was unreasonable under the particular circumstances of the case even though the policy was not inherently unreasonable.\textsuperscript{103} Second, the court found that the company was aware that cases like this were common when someone was killed by one its trains at a grade crossing and that voice tapes were relevant to such litigation.\textsuperscript{104} Finally, the court stressed that the voice tapes were the only contemporaneous recording of conversations regarding the accident and, thus, would always be “highly relevant” in litigation over such fatal accidents.\textsuperscript{105} In essence, the court relied on the fact that the plaintiff was greatly prejudiced by the destruction of the voice tapes in finding that, while it pushed the bounds of what it would consider bad faith, “[t]he prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence…”\textsuperscript{106}

As to the destruction of relevant documents after commencement of the suit, the court easily found sufficient evidence to support the adverse inference instruction given as to that evidence.\textsuperscript{107} In reaching this conclusion, the court held that after receiving a specific document request, a party “cannot rely on its routine document retention policy as a shield” against sanctions.\textsuperscript{108} It must institute a litigation hold on its document retention policy.\textsuperscript{109}

C. Electronic Document Retention Policy Cases

The first major case regarding spoliation of evidence under an electronic document retention policy was Computer Associates International, Inc. v. American Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990). In Computer Associates, a breach of computer software agreement, unfair competition, and copyright infringement case, the plaintiff moved for default judgment based on the defendant’s destruction of the source code it used to create the disputed software.\textsuperscript{110} A magistrate judge for the District Court of the District of Colorado recommended that the district court enter a sanction short of default judgment. The district court rejected the magistrate’s recommendation and entered default judgment against the defendant for its destruction of the source code under its electronic document retention policy.\textsuperscript{111}

The court observed that the defendant’s policy called for retention of only the current source code and “[u]nder that procedure, as the program was

\textsuperscript{100} Id.
\textsuperscript{101} 354 F.3d at 747.
\textsuperscript{102} Id.
\textsuperscript{103} See id.
\textsuperscript{104} Id. at 748.
\textsuperscript{105} Id.
\textsuperscript{106} Id. This conclusion is supported by the fact that the court did not find sufficient evidence of bad faith in the company’s destruction of track maintenance records to give an adverse inference instruction on that issue. The court noted that the track maintenance records were not as relevant as the voice tapes because they would not show the track’s condition on the date of the accident and the plaintiff did not suffer as much prejudice from the maintenance records’ destruction. See id. at 748-49. It is also important to note that the court may have been swayed by the fact that there was some evidence that the company often retained and produced voice tapes that were helpful to it in similar cases. See id. at 748.
\textsuperscript{107} Id. at 749-50.
\textsuperscript{108} Id. at 750.
\textsuperscript{109} Finally, the appellate court held that the district court erred in not permitting the company to present evidence regarding its routine document retention policy in order to rebut the permissive adverse inference instruction. Id.
\textsuperscript{110} 133 F.R.D. at 167. Source code is a computer programming form “written in a language that suitably trained programmers can read and understand.” Id. at 168 n. 1.
\textsuperscript{111} Id. at 170.
revised, previous versions were destroyed." The court further noted that such a policy was common practice in the computer software industry, was legitimate, and, therefore, was not inherently wrongful. The defendant, however, continued to follow its routine policy and destroy source code even after litigation commenced, despite knowing that it was the best evidence regarding the central issue in dispute. It intentionally failed to place a litigation hold on its electronic document retention policy, and in doing so, willfully violated its discovery obligations. Thus, the court granted the plaintiff’s motion for default judgment.

In Trigon Insurance Co. v. U.S., 204 F.R.D. 277 (E.D. Va. 2001), a suit challenging the Internal Revenue Service’s denial of tax refunds, the plaintiff filed a motion in limine for sanctions against the government, alleging that the U.S. had destroyed documents relevant to litigation. Because of the complexity of the case, the government hired a litigation consultant to help it prepare for trial. The consultant worked in a dual capacity—as a non-testifying expert consultant and as testifying experts. Upon learning of this, the plaintiff requested production of all correspondence, including e-mails and drafts of expert opinions, between testifying experts and the consultant. The government refused production, and some of the documents were destroyed, either in accordance with the consultant’s electronic document retention policy or as a matter of course by the experts themselves. One of the grounds the government used to defend against sanctions for spoliation was that the documents had been destroyed in accordance with the consultant’s document retention policy. In rejecting this defense, the District Court for the Eastern District of Virginia noted that the consultant’s document retention policy did “not trump the Federal Rules of Civil Procedure or requests by opposing counsel, even if the requests primarily [were] informal.” The court also noted that the consultant’s policy was at odds with the Federal Rules because it called for the destruction of discoverable documents—anything considered by the testifying experts in forming their opinions—and, therefore, did not protect the government from a finding of intentional destruction of relevant documents and spoliation sanctions.

In Zubulake v. UBS Warburg, L.L.C. (Zubulake IV),--F.R.D.--, 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003), an employment discrimination action, the plaintiff-employee moved for sanctions against the defendant-employer for failing to preserve e-mails of employees central to the suit. The defendant had a formal electronic document retention policy in place prior to commencement of the suit. In particular, it retained all monthly backup tapes for three years. Further, in response to the plaintiff’s filing of an EEOC charge, the defendant’s in-house counsel orally directed employees to keep all documents, including e-mails and backup tapes, that might be relevant to the suit. Finally, outside counsel reiterated the company’s need to comply with its preservation obligation. Nonetheless, certain relevant e-mails and backup tapes were destroyed.

The District Court for the Southern District of New York remarked that had the retention policy and counsels’ directives been followed, the company would have met all its preservation obligations “by preserving one copy of all relevant documents that existed at, or were created after, the time when the duty to preserve attached.” However, because employees did not follow the policy and directives, and relevant documents were destroyed, the Company had breached its preservation duty. The court summarized a party’s duty to preserve, stating:

The scope of a party’s preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

In addition to finding fault with a party’s application of its electronic document preservation plan, federal courts also routinely focus on the lack of a formal, comprehensive document retention policy, either

112 Id. at 168.
113 Id.
114 Id. at 169.
115 Id. at 170.
116 204 F.R.D. at 289.
117 Id.
118 Id.
120 Id. The court did create one exception to its general rule. If a company is capable of identifying particular employees’ documents, then the company should preserve the backup tapes containing the documents of “key” employees if it is not otherwise available. The exception applies to all backup tapes, inaccessible and accessible. Id.
before or after the suit commences, when determining whether to sanction a party. For instance, in *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000), a securities class action suit, the plaintiffs claimed that the defendant-company had intentionally destroyed relevant electronic documents after commencement of the suit. In particular, the plaintiffs alleged that the company continued to purge its system of terminated employees’ records after the suit had been filed. Although the District Court for the Northern District of Illinois rejected the argument that the company intentionally destroyed relevant electronic documents, it did find that the company engaged in grossly negligent behavior and that relevant electronic documents had been spoliated as a result.\(^\text{121}\)

In this context, it is important to note that the company did take some affirmative action to ensure that relevant electronic documents were preserved. On the day the plaintiffs filed their complaint, the Board of Directors met with both in-house and outside counsel to discuss the company’s duty to preserve all relevant documents then in existence. At the meeting, outside counsel stressed that document preservation had to be a top priority. As a result, the Board directed senior management, including the CEO, to take prompt action to preserve documents. In-house counsel also conducted a meeting attended by the company’s officers and high level managers where they discussed the need to preserve documents. In-house counsel specifically instructed the officers and managers to preserve all relevant documents and to communicate this directive to the employees within their respective departments. The senior executives preserved their computer files.

Nonetheless, the court found that the company failed to implement and enforce an adequate electronic document retention plan. The court detailed a litany of reasons why the company’s plan was grossly inadequate, including: (1) the CEO personally took no affirmative steps to ensure that the preservation directive was followed; (2) he also did not direct anyone to develop a written comprehensive document preservation policy, either in general or with specific reference to the lawsuit; (3) he did not instruct that any e-mail or other communication be sent to the Company’s employees to ensure that they were aware of the lawsuit and the need to preserve all relevant documents; (4) he did not follow up on the directive to make sure it was being implemented; (5) he delegated the document preservation responsibility to in-house counsel; the in-house counsel had no litigation experience or experience in putting together a document preservation plan; (6) neither the CEO nor in-house counsel consulted outside counsel for assistance in developing or implementing a suitable document preservation plan; (7) in-house counsel did not ensure that all employees who handled relevant documents were aware of the lawsuit and the need to preserve documents; (8) in-house counsel did not follow up to make sure the directive was being followed; (9) in-house counsel did not review the pre-existing practice of deleting terminated employees’ files to determine whether that practice was still suitable in light of the need to preserve documents relevant to the litigation; and (10) there was no systematic effort to archive e-mails as of the commencement of the suit.\(^\text{122}\) As the cases described above demonstrate, a comprehensive document retention policy can limit a company’s exposure to sanctions for spoliation when it is implemented in good faith and consistently applied. In fact, the absence of a document retention policy can be used as evidence that a litigant was culpable in its spoliation of relevant evidence. However, a document retention policy will not shield a litigant from sanctions if the policy was implemented in bad faith or applied unreasonably or inconsistently. Most importantly, even an otherwise valid policy will be insufficient to defend against sanctions if a party fails to implement a litigation hold once the party reasonably anticipates that the documents will be relevant to some pending or threatened litigation.

**VIII. CONCLUSION**

The dramatic increase in the use of electronic media has fundamentally changed civil discovery. Courts, litigants, and attorneys are faced with new issues, such as when shifting the costs of discovery is appropriate. In addition, old issues, like the preservation duty and counsel’s ethical obligations, have been given a new spin. Unfortunately, courts have been inconsistent in the way they approach these issues in electronic discovery disputes. Some states have revised their rules to reflect the realities of electronic discovery and to deal with particular issues, and in the past month, a panel of the United States Judicial Conference has approved a set of proposed rule amendments that would be a first step toward doing the same on the federal level. However, these proposed changes will not take effect until December 2006, at the earliest. Until then, litigants and their attorneys must continue to identify and adhere to the

\(^{121}\) 2000 WL 1694325, at *18.

\(^{122}\) Id. at **14-15. The court held the CEO personally liable for the Company’s failure to implement and follow an adequate document preservation policy and fined him $10,000. Id. at *41. In contrast, the court did not hold the outside director-defendants personally liable for the Company’s failings because they did not have a day-today presence at the company and, therefore, could not as effectively ensure documents were preserved. Id.
standards used to deal with electronic discovery issues in their particular jurisdiction.